(2005) One Lawyer's Opinion of the Current Legal Status of Short Term Tourist Accommodation Rentals, ("STR") on Hornby Island

The Hornby Island Official Community Plan, Bylaw No. 104, 2002, (the "OCP") expressly recognizes short-term rentals and contemplates their continued availability.

"ss. 6.3.1 Residential-General

…the majority of properties are owned by non-residents and most of these are occupied and/or rented seasonally…"

ss. 6.3.3 Small Lot Residential/Water Protection Area (Whaling Station Bay/Anderson Drive Area)

ss. 6.3.3.8 Bed and Breakfasts and short-term rents are permitted as a home occupation (subject to 6.3.1.7) providing the number of guests does not exceed the design capacity of the approved water treatment system.

ss. 6.3.3.10 …The use of water catchment and storage systems for household and garden use, and in particular for Bed And Breakfasts and short term rental home occupations, shall be strongly encouraged."

ss. 6.5.2 Visitor Accommodations and Tourism

…Short-term rental of residential units has been a long-standing means of providing visitor accommodation, but there is also concern about impacts, both in neighbourhoods and cumulatively.

ss. 6.5.2.11 The rental of an individual dwelling unit in order to provide temporary accommodation for paying guests shall be permitted as a home occupation.

ss. 6.5.3.1 Home Occupation means an occupation or profession conducted for gain by a full-time or part-time resident of the lot on which the dwelling is located.

ss.6.5.3.7 The rental of an individual dwelling unit in order to provide temporary accommodation for paying guests shall be permitted as a home occupation.

The *Local Government Act*, (binding on Islands Trust), states that an OCP does not commit or authorize a municipality, regional district or improvement district to proceed with any project that is specified in the plan. It is intended to be a general statement of policy. However, as also pointed out in the *Local Government Act*, all subsequent by-laws enacted "must be consistent" with the OCP. The OCP itself acknowledges this restriction:

"…Section 884(2) of the Local Government Act requires that all bylaws enacted, permits issued, and works undertaken by the Hornby Island Local Trust Committee be consistent with the Official Community Plan".

In the BC Supreme Court case, Nanaimo (Regional District) v. BC (Information and Privacy Commissioner) {1991} BCJ No. 1283, (BCSC), the Judge states:

> *"…the OCP does have a legal effect on the government bodies referred to, in that it controls or restricts all future development. It also does have some legal effect regarding private landowners as well, because zoning by-laws, which effect them, must be consistent with the OCP"; and*
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> *"I am also of the view that the OCP is a by-law or legal instrument "by which the local public body acts". When a regional district adopts an OCP by by-law it triggers, or brings into play, S. 884(2) of the [then] Municipal Act, which is a statutory obligation, and thereby requires all subsequent by-laws enacted and works undertaken to be consistent with the OCP".*

It is suggested that, as the OCP is currently worded, Islands Trust lacks the statutory power to pass a bylaw that prohibits STR, as that would be in direct conflict with the OCP.

Assuming the OCP could be read in such a manner as permitting the exclusion of STR, the question then would be, "Does By-law 86 operate in such a manner so as to effect that prohibition?"

Bylaw 86 (1993) permits Home Occupations in Small Lot Residentially Zoned Areas. "Home Occupation" is defined as a "*commercial activity conducted for gain within a dwelling unit or permitted accessory building by a resident of the lot on which the building is located.*" There is an enumerated list of activities "included" in the definition of "Home Occupation". STR is not on that list. However, courts have consistently interpreted such lists as illustrative only, and not exclusionary.

It has been suggested that an off-Island owner is not a "resident", and therefore, cannot undertake a "Home Occupation". As was pointed out by the Ont. Court of Appeal in Toronto General Hospital v. Renfrew (Town) (1925), 29 OWN 151, 58 OLR 71, at 73, when quoting from the Chief Justice's decision in Mellish v. VanNorman (1856), 13 U.C.R. 451, at p. 455:

> *"The term "resident"…is differently construed…according to the purposes for which inquiry is made into the meaning of the term. The sense in which it should be used is controlled by the reference to the object."*

It is of assistance to note that in the Ont. H.C. case Peterbaugh v. Marsbergen [1984] O.J. No. 392, the court was asked to define "residence", and made the following observation:

> *"It is quite clear that a person may have more than one residence. For example a person may have a residence at his summer cottage and another residence in town. Having a residence at a summer cottage is not broken by a temporary absence from the cottage during the winter months…"*

The Court continued on to state that:

> *"The word "reside" is very flexible and has more than once been said to be incapable of exact definition. The duty of the Court in interpreting any statute where the word is found is to attribute to it such meaning as will best give effect*

> *to the legislative will…. The true light must be found within the statute. All else only increases the darkness."*

It should also be remembered that section 6.5.3.1 of the OCP speaks of a home occupation as being conducted by a full-time **or part-time** resident of the lot on which the dwelling is located. [Emphasis added]

{See also: Terminal City Club Tower v. BC (Assessor of Area No. 9-Vancouver) [2003] B.C.J. No. 1070, which held that individually owned strata-titled units remained residential units for the purpose of assessment, notwithstanding their acknowledged use as overnight, commercial accommodations, because 'residential use' did not have to include an element of extended duration. Although the case was overturned on Appeal on different, unrelated grounds, on the issue of the residential classification, the BCCA was satisfied that the view of the Chambers Judge regarding the residential status issue was correct.}

Furthermore, as the Judge in the Nanaimo Regional District case emphasized:

> *"The Courts are very protective of the rights of individual landowners, to do what they want with their lands. Hence, any statutory derogation from those rights must be clearly spelled out."*

It is suggested that nothing in Bylaw 86 meets this test.

As the above discussion indicates, it appears STR are not "illegal" as a result of the OCP. Nor are they "illegal" as a result of By-law 86. It appears that, in presuming that short-term rentals are currently "illegal", Island Trust representatives have put much weight on the decision of the BCSC, (upheld without discussion by the BCCA), in Whistler (Resort Municipality) v. Miller [2001] BCJ No. 69. In the Whistler v. Miller case, the challenged bylaw included the following definitions:

> *""home occupation" means a craft or occupation conducted as an accessory use subordinate to the principal use of a residential dwelling;*
>
> *"principal" means the primary purpose for which the land, buildings or structures are ordinarily used;*
>
> *"residential" means a fixed place of living, excluding any temporary accommodation, to which a person intends to return when absent;*
>
> *"temporary" means a total of less than four consecutive weeks in a calendar year; and*
>
> *"tourist accommodation" means a building containing one or more habitable rooms or dwelling units that are used primarily for temporary lodging by visitors.""*

In light of the relevant definitions contained in the Whistler by-law, the Court concluded that renting the dwelling in question out for short-term rentals was not "ancillary" or "subordinate" to its "principal, residential use" and therefore, it was not a permitted use.

The Court found support for its conclusion from the fact that, (contrary to Hornby's current bylaw), the Whistler bylaw expressly disallowed "temporary accommodation" from the definition of "residential" use.

The Court in the Whister decision also found that by-law prohibiting STR was valid and not beyond the powers of the Municipality to pass, because STR are not a 'normal and customary' residential use. Therefore, in addition to upholding the validity of the specific bylaw in question, the Whistler decisions, (both Whistler v. Miller and Whistler v. Wright) would support the assertion that governmental bodies have the legal capacity to draft a bylaw that expressly prohibits temporary accommodation within certain zoned areas. However, these cases do not stand for the proposition that, in the absence of expressly permissive language within the relevant OCP and bylaw, short-term rentals are deemed "illegal". Furthermore, the decisions most certainly cannot be said to override the expressly permissive language contained in Hornby's OCP.

In the absence of statutory or case law authorities indicating otherwise, I am of the opinion that the courts would not find that 'off-Islanders' who currently personally reside in their Hornby dwellings only part-time, and otherwise rent those dwellings out for seasonal STR, are acting "illegally".

In light of the fact that the Islands Trust Questionnaire currently being circulated contains an Islands Trust distributed Information Sheet that commences with the statement that "Commercial short-term rentals are currently illegal on Hornby", one is left to question the validity of the responses received.

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Please note that, in addition to being a practicing BC lawyer, (called in 1989), I am also a 50% owner of a residential lot on Hornby. My brother and I use our property part-time, and rent the dwelling as a STR for several weeks each summer. The comments herein reflect my opinion only and are intended to provide general information. Readers should not act on the basis of this information without first consulting their own lawyer who will provide analysis and advice based on their specific matter and facts.